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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ———

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - *Appellant,*

v.

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., - - - - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT.

Appellant, Louisville and Nashville Railroad Company, appeals from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered in the form of an order on February 5, 1970, as amended and modified on March 19, 1970, setting aside an order of the Interstate Commerce Commission. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the court below is contained in its order of February 5, 1970, and its amending and modifying order of March 19, 1970, and they are reproduced and attached, respectively, as Appendix A and Appendix B. These orders are not reported. The opinion of the Interstate Commerce Commission is reported at 333 I.C.C. 720 (1968).

JURISDICTION

This suit was brought by appellees under 28 U.S.C. § 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the district court was entered in the form of an order on February 5, 1970, as amended and modified by order entered March 19, 1970. Notice of appeal was filed in the court below on April 17, 1970. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal. *United States v. Drum*, 368 U. S. 370 (1961); *Dixie Carriers, Inc. v. United States*, 351 U. S. 56 (1956).

QUESTIONS PRESENTED

1. Whether the court below, convened pursuant to the provisions of 28 U.S.C. § 1336 to review an order of the Interstate Commerce Commission upon suit brought by appellees, acted properly in summarily vacating the

order of the Commission and remanding the case to the Commission for further proceedings without recognizing and granting the right to the parties to be heard on the merits of the case, without making the required findings of fact and conclusions of law, and without finding that the Commission in any respect erred in issuing its order.

2. Whether the court below, when this case was pending before it on the issue of whether the case should be remanded to the Interstate Commerce Commission for further proceedings, had the authority to require, by mandatory order, that the appellant reestablish a passenger train service which had been lawfully discontinued for some eighteen months pursuant to the provisions of section 13a(1) of the Interstate Commerce Act.

STATUTES INVOLVED

28 U.S.C. § 2325 and Section 13a(1) of the Interstate Commerce Act [49 U.S.C. § 13a(1)] are set forth in Appendix C hereto.

STATEMENT

By report and order served September 6, 1968, the Interstate Commerce Commission discontinued its investigation of Louisville and Nashville Railroad Company (L&N) passenger trains Nos. 6 and 7, which operated between Cincinnati, Ohio, and New Orleans, Louisiana. *Louisville & N. R. Co. Discontinuance of Trains,* 333 I.C.C. 720 (1968). Such investigation was held pursuant to the provisions of Section 13a(1) of

the Interstate Commerce Act, with hearings conducted at various points along the route of the trains.

The Tennessee Public Service Commission and certain other appellees herein instituted an action in the court below on September 6, 1968, and obtained a temporary restraining order against the discontinuance of the trains. The case was assigned No. 68 C 1666.

On November 4, 1968, the three-judge court was convened and heard argument on various motions, none of which dealt with the cases on their merits.[1]

On January 8, 1969, the court below issued its orders dismissing the complaints in No. 68 C 1666 [*Tennessee Public Service Commission v. United States*, 294 F. Supp. 1106 (1969)] and in No. 68 C 956 [*City of Chicago v. United States*, 294 F. Supp. 1103 (1969)] for lack of jurisdiction in the court to review an order, issued by the Commission under the provisions of Section 13a(1), discontinuing its investigation of a proposed train discontinuance. The court also dissolved the temporary restraining order in No. 68 C 1666.

Plaintiffs' applications for stays from the court below and this Court were denied. Accordingly, the trains were discontinued.

Upon appeal to this Court, probable jurisdiction of the C&EI and L&N cases was noted, and they were consolidated because they presented to this Court the same question, namely, whether the Commission's orders were subject to judicial review. On December 9, 1969,

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[1]Heard by the court below at the same time were motions in No. 68 C 956, an action to set aside the Commission's order authorizing discontinuance by Chicago & Eastern Illinois Railroad Company (C&EI) of its trains Nos. 54 and 93, which formerly operated between Chicago, Illinois, and Evansville, Indiana.

this Court issued its opinion, reversing and remanding the cases to the court below for further proceedings in conformity with the opinion of this Court. *City of Chicago v. United States,* 396 U. S. 162.

Thereafter, on January 7, 1970, Tennessee Public Service Commission, and certain other appellees herein, filed with the court below a document captioned "Motion on Mandate of the Supreme Court" seeking, among other things, the reinstatement of the restraining order which had been dissolved by the court below on January 8, 1969. L&N replied to that motion. By order dated February 5, 1970, the court below, without receiving oral or written argument on the merits, ordered that Nos. 68 C 956 (the C&EI case) and 68 C 1666 (the L&N case) be remanded to the Commission for further proceedings, apparently in the mistaken belief that this Court's opinion and judgment required summary vacation of the Commission's orders and remand to the Commission for further proceedings. The court held under advisement until the Commission entered a final order the motion to require L&N to reinstitute operation of the trains.

Thereafter, L&N and C&EI, in their respective cases, and the government in both cases, sought reconsideration of the order. L&N contended, among other things, that the court had no power to remand the L&N case summarily to the Commission without hearing and disposition of the case on its merits. Tennessee Public Service Commission and other appellees herein also petitioned the court below seeking, again,

an order requiring the L&N to commence operation of the trains.

On March 19, 1970, the court below, still without hearing argument or receiving briefs on the merits of the cases, reaffirmed its February 5 order in Nos. 68 C 956 and 68 C 1666 insofar as it vacated and set aside the Commission's orders and remanded the two cases to the Commission for further proceedings. Moreover, the court below summarily directed the Commission to consolidate the cases and modified its first order so as to require L&N to re-institute the operation of the trains.

L&N filed a motion in the court below for a stay of its order pending appeal to this Court. The motion was denied on March 27, 1970, but L&N's application to this Court for a stay of the order of the court below was granted on April 3, 1970, by this Court, *en banc,* Mr. Justice Douglas dissenting.

L&N filed its notice of appeal in the court below on April 17, 1970, as amended on that date. The notice and amendment are attached hereto as Appendix D and Appendix E, respectively.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

When plaintiffs below brought the action to set aside the Commission's order, they sought a decision under established standards of review of administrative orders. The court below, however, did not under-

take such review because it concluded that orders discontinuing investigations under Section 13a(1) are not subject to judicial review, and the complaint was dismissed.

On appeal, this Court reversed the court below on that issue, the only issue involved in the appeal. *City of Chicago v. United States,* 396 U. S. 162 (1969).

The mandate of this Court is, of course, "controlling as to matters within its compass." *Sprague v. Ticonic Bank,* 307 U. S. 161, 168 (1939). Nothing in the mandate could properly be construed by the court below to constitute a decision on the merits or to require or even to suggest a remand of the case summarily to the Commission. The court below had the *duty* on remand to review the case on its merits to determine whether the action of the Commission had warrant in the record and a reasonable basis in law. *American Airlines v. Civil Aeronautics Board,* 231 F. 2d 483 (D.C. Cir. 1956); *Aberdeen and Rockfish R.R. v. United States,* 270 F. Supp. 695 (D.C. La. 1967), *modified and aff'd sub nom., Baltimore & O. R.R. v. Aberdeen & Rockfish R.R.,* 393 U.S. 87 (1968). Accordingly, the court below should have treated the case on remand exactly as it came originally to that court. *Union Pac. R.R. v. Johnson,* 249 F. 2d 674, 676 (9th Cir. 1957).

The only hearing before the three-judge court in this case was held on November 4, 1968, at which various preliminary motions were argued. The merits of the case were not then, or at any other time, argued and

no briefs on the merits have ever been filed.[1] Thus, defendant has never been given the opportunity to show to the court below that the plaintiff who would upset an order of the Interstate Commerce Commission "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences, ..." *I.C.C. v. Jersey City*, 322 U. S. 503 (1944); that the findings of the Commission are made by law *prima facie* true, *Illinois C. R. R. v. Interstate Com. Comm'n.*, 206 U. S. 441 (1907); that the Commission's conclusions when supported by substantial evidence are final, *Interstate Com. Comm'n. v. Union Pac. R.R.*, 222 U. S. 541 (1912); and that the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the Commission, *Miss. Valley Barge Line Co. v. United States*, 292 U.S. 282 (1934). Instead, the court below has disposed of the case in summary manner, without hearing argument or receiving briefs on the merits, and has included in its final order a mandatory injunction without supporting basis.

The right to submit argument to the court is an essential of a full hearing on the merits. *Cf. Morgan v. United States*, 304 U.S. 1, 18 (1938). A permanent injunction granted against a party who was afforded no opportunity to argue against it is invalid and should, on appeal, be set aside. *Cf. Sims v. Greene*, 161 F. 2d 87 (3d Cir. 1947).

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[1]Counsel for appellees recognized that the November 4, 1968, hearing was not on the merits (Transcript of November 4, 1968, hearing, p. 26, which is on file in this Court as part of the record in the previous appeal).

28 USC § 2325 provides as follows:

> . . .
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is *heard and determined* by a district court of three judges under section 2284 of this title." (Emphasis added)

And this Court, construing this provision in *Ayrshire Corp. v. United States,* 331 U.S. 132, 137 (1947), held:

> "When the framers of the Urgent Deficiencies Act declared that these applications 'shall be heard and determined by three judges,' we assume that they meant exactly what they said. The requirement that three judges hear and determine an application means that they must adjudicate the issues of law and fact which are presented by the case, a function which implies that they must weigh the arguments and testimony offered by both sides and vote either to grant or deny the relief sought by the moving party."

In setting aside the Commission's order, the court below has completely failed to "adjudicate the issues of law and fact which are presented by the case." The court below did not hear argument and did not receive briefs on such pertinent issues as whether the Commission correctly concluded that continued operation of the trains is not required by public convenience and necessity and will unduly burden interstate commerce, the statutory standards in issue in Section 13a(1) cases. The court below did not hear

argument, receive briefs or rule that the Commission erred in finding that the L&N would "suffer out-of-pocket losses in excess of $900,000 annually;" and that "[n]othing in the record indicates that the deficit could be abated in future years" (333 I.C.C. at p. 727). In addition, the court below did not pass on the issue of the minimal use of the trains which caused the Commission to find (333 I.C.C. at p. 729):

> "'This is plainly a case where there are too many trains for the diminishing needs of the public on this line."

Nowhere in the order of the court below is there any finding that the Commission was in error in making these essential and dispositive findings and at no time did defendants have an opportunity to brief or to argue these points. L&N was entitled to have the case tried and decided in the court below on its merits. This was not done.

In addition to improperly vacating the Commission's order, the order entered by the court below requires L&N to reinstate trains the operation of which was discontinued more than 18 months ago. The order is not a temporary restraining order; it is a permanent injunction, and the court below entered it without a hearing on the merits and without making the necessary findings of fact and conclusions of law.

The specific limits of the authority of a 3-judge district court to enter a temporary restraining order are set out in 28 U.S.C. § 2284. It provides that where an application for an interlocutory injunction is made, the district judge to whom the application is made may

"grant a temporary restraining order to prevent irreparable injury." The section further provides that unless revoked by the district judge, a temporary restraining order shall remain in force "until the hearing and determination by the full court." The order of which we complain is not one entered to prevent irreparable injury until the hearing and determination by the full court. It was entered by the full court as their final order. It does not maintain the *status quo* to prevent irreparable injury; it is a permanent injunction issued upon the vacation of the Commission's order and requires a restoration of trains discontinued over 18 months ago.

In *Ettelson v. Metropolitan Ins. Co.*, 317 U.S. 188 (1942), this Court said that in deciding whether an order is an injunction, the question is not to be decided by the terminology used by the lower court but by the substantial effect of the order made. Guided by the *Ettelson* case, the Court of Appeals for the 3d Circuit, in *Sims v. Greene*, 160 F. 2d 512 (1947), ruled that a "restraining order" continued in effect by the lower court was in fact a temporary injunction and that it was improperly entered because the trial court had not made the findings and conclusions required by Rule 52 of the Federal Rules of Civil Procedure.[1]

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[1]Rule 52(a) provides in pertinent part:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; *and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.*" (Emphasis added)

This Court has squarely held that Rule 52(a) must be observed by three-judge district courts such as the one below. Please see *Mayo v. Canning Co.*, 309 U.S. 310 (1940), where the Court said of an injunction issued by such a court (p. 316):

> "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure."

Rule 52(a) likewise applies to a judgment such as the one below granting a permanent injunction. *Chas. Pfizer & Co. v. Zenith Laboratories, Inc.*, 339 F. 2d 429 (3d Cir. 1964); *Tribune Review Publishing Co. v. Thomas*, 133 F. Supp. 486 (W.D. Pa. 1957).

The high importance of compliance with Rule 52(a) is clearly pointed up by the case at bar. The court below failed to state or even suggest the basis upon which the Commission in any respect erred in authorizing discontinuance by L&N of trains Nos. 6 and 7. The court made no findings or conclusions with respect to any of the following: whether sufficient evidence supported the Commission's preliminary or ultimate findings; whether the Commission made adequate findings; whether the Commission erred as a matter of law[1]; whether the Commission, in any way, acted ar-

[1]The issue of law concerning the posting of notices at points beyond the line of the carrier proposing discontinuance, an issue involved in the *C&EI* case, was not, and could not properly have been, raised in the court below in the *L&N* case.

bitrarily or capriciously. Indeed, the failure of the court below to try this case on its merits prevented it from having a knowledge of the case and so deprived it of any basis for making any such findings, none of which could have been made, we submit, had judicial review been undertaken. Accordingly, on remand of the case to the Commission, the Commission and the parties would be at a loss in their attempt to determine the purpose and extent of further proceedings to cure unknown deficiencies in the Commission's report and order.

II

Section 13a(1) of the Interstate Commerce Act limits the Commission to requiring continued operation of passenger trains for a period not to exceed four months after the end of the railroad's thirty-day notice of discontinuance, unless the Commission, after investigation, orders the trains to be continued for a period not to exceed one year. The effect of the mandatory order of the court below in this case is to extend the period of operation of the trains beyond the four-month suspension period provided in the statute. This Court has held that such a statutory period cannot be so extended. *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963).

In the *Arrow* case, *supra*, the Court held that Congress had provided the Commission with a power under Section 15(7) of the Interstate Commerce Act to sus-

pend a freight rate for a period of no longer than seven months, and that a federal district court had no authority to extend that seven-month period by the issuance of a temporary restraining order. In so holding, this Court said (p. 667):

> "We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief."

The analogy between the suspension power of the Commission under Section 15(7) and its suspension power under Section 13a(1) is clear. Congress in each instance provided a specific suspension period for a specific reason. With respect to the suspension of freight rates, the seven-month period was enacted to bring about uniformity in freight rates and to avoid competitive inequities. *Arrow* case, *supra*, at 662-663. The suspension period provided in Section 13a(1) was set at four months to avoid the needless delays previously encountered by the railroads in proceedings before state regulatory bodies in eliminating costly and little-used passenger trains [H. Rep. No. 1922, 85th Cong. 2nd Sess. (1958), 1958 *U. S. Code Cong. & Ad. News*, pp. 3467-3468].

Moreover, the form of the order of the court below, requiring reinstitution of operation of trains lawfully discontinued in accordance with agency action, exceeds

the function of judicial review, assuming *arguendo* that the court did, in fact, undertake review of the case on the merits.

Section 13a(1) empowers the Commission alone to determine whether a particular train is or is not to be operated, and this is true whether such determination occurs before or after the train has ceased operation. It provides in pertinent part as follows:

> "If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance *or restoration* of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order." (Emphasis added.)

Thus the court below exceeded its power by ordering reinstitution of the trains, a matter left, by statute, solely to the judgment of the Commission.

The function of a court in reviewing an order of the Commission has been clearly defined by this Court in numerous cases, and in no instance has this Court sanctioned an attempt by a reviewing court to exercise a function which Congress committed to agency action. As this Court held in *Federal Communications Comm'n. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940), "an administrative determination in which

is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." And hence "[a]fter the remand was made . . . the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress." *Securities Comm'n. v. Chenery Corp.*, 332 U. S. 194, 201 (1947). Please see also: *Federal Power Comm'n. v. Idaho Power Co.*, 344 U. S. 17, 20 (1952); *United States v. Saskatchewan Minerals*, 385 U. S. 94 (1966).

Accordingly, the court below erred in issuing a mandatory order requiring L&N to begin operation of the trains.[1]

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[1]In addition, the court below erred in requiring the Commission to consolidate the L&N and C&EI cases on remand. This, also, is a matter for the Commission's discretion, not the court's. *Cf. Boston and Maine R.R. v. United States*, 208 F. Supp. 661, 677 (D.C. Mass. 1962).

CONCLUSION

The questions presented are substantial. For the reasons stated, it is urged that the judgment of the court below be reversed and the case remanded to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

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Due Date: July 17, 1970.

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.
No. 68 C 956

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.
No. 68 C 1666

ORDER

This cause is before this three-judge court on the motion of plaintiffs and intervening plaintiffs, on mandate of the Supreme Court of the United States, issued January 5, 1970, in Nos. 101 & 102, Oct. Term 1969, *City of Chicago* v. *United States,* (1) to reinstate the temporary restraining order in case No. 68 C 1666 and (2) to remand cause No. 68 C 1666 to the Interstate Commerce Commission, upon grant of plaintiffs' motion for summary judgment in No. 68 C 956.

The court has considered the opinion of the Supreme Court of the United States and the mandate issued thereon, and being fully advised in the premises,

It is ordered that both causes numbered 68 C 956 and 68 C 1666 be remanded to the Interstate Commerce Commission for further hearings.

It is further ordered that the motion made herein to reinstate the restraining order in said cause No. 68 C 1666 be held under advisement until the Interstate Commerce Commission concludes its hearings and makes its report and enters a final order therein.

(s) WIN G. KNOCH
United States Circuit Judge

(s) J. SAM PERRY
United States District Judge

(s) EDWIN A. ROBSON
United States District Judge

Dated: Chicago, Illinois,
February 5, 1970.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CITY OF CHICAGO, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.
No. 68 C 956

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Plaintiffs
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.
No. 68 C 1666

ORDER

Following the filing of a copy of the mandate of the Supreme Court of the United States herein with the Clerk of the District Court, this three-judge court on February 5, 1970 entered an order wherein it (1) remanded both causes numbered 68 C 956 and 68 C 1666 to the Interstate Commerce Commission ("I.C.C.") for further proceedings and (2) held under advisement the motion made by plaintiffs and intervening plaintiffs to reinstate the temporary restraining order in case 68 C 1666 until the conclusion of the proceedings before the I.C.C.

Thereafter the various parties filed various motions and the three-judge court now has before it (1) motion of defendant Chicago & Eastern Illinois Railroad Company ("C&EI") for rehearing or amendment of said order of February 5, 1970; (2) motion of defendant Louisville and Nashville Railroad Company ("L&N") for rehearing and amendment of said order; (3) motion of defendants United States of America and I.C.C. for a new trial in both cases with memorandum in support thereof; (4) motion of plaintiffs and intervening plaintiffs for reconsideration and amendment of said February 5 order with memorandum in support thereof; (5) response of plaintiffs and intervening plaintiffs to the aforesaid motions of defendants; (6) response of defendant C&EI to plaintiffs' and intervening plaintiffs' motion, and (7) response of defendant L&N to plaintiffs' and intervening plaintiffs' motion.

The Court has considered all the foregoing motions, the responses and memoranda of the parties hereto and the opinion of the Supreme Court herein and is of the opinion that it should reconsider its order of February 5, 1970 and should modify and amend said order as hereinafter set forth in view of the additional facts and law presented to the Court.

It is, therefore, ORDERED, that the order of this Court entered herein on February 5, 1970 be and the same is hereby vacated.

The Court also has before it a motion by plaintiffs to consolidate cause No. 68 C 1666 with cause No. 68 C 956 on the ground that the two actions involve a common question of law and fact. Said motion was filed September 6, 1968, briefed and argued before the three-judge court on November 4, 1968. The Court reserved its ruling on same. The Supreme Court of the United States consolidated these cases for hearing and it is the opinion of this Court that the plaintiffs' motion to consolidate should now be granted.

It is, therefore, ORDERED that cause No. 68 C 956 and cause No. 68 C 1666 be and they are hereby consolidated.

The Court is of the opinion that it is equitable and in the best interest of the general public to maintain the status quo which existed on September 6, 1968 until further determination of these causes, as was originally done by entry of a restraining order in case No. 68 C 1666 by Judge Edwin A. Robson on that date, immediately after the filing of this suit, and which restraining order against discontinuance of the "Hummingbird" trains by the L&N was continued in full force and effect on September 12, 1968 by Judge Joseph Sam Perry. The temporary restraining order was heretofore dissolved by the Court in its order of January 8, 1969 granting the motion of L&N to dismiss.

Plaintiffs and intervening plaintiffs allege in their memorandum, filed February 16, 1970, that the L&N promised "restoration of the train service to the Circuit Justice" and that allegation has not been denied.

The Court finds that the L&N, in its Memorandum in opposition to application to stay, represented to the Circuit Justice on January 10, 1969 the following:

> ". . . petitioners will have full right to pursue their statutory appeal to this Court, and if this Court should determine, upon full consideration, that the question of the operation of the trains should be examined by the Court below, the respondent railroad company will be fully answerable. In other words, the respondent railroad company will promptly resume the operation of the trains if required to do so by lawful order." (L&N Memorandum in Opposition to the Application to Stay, p. 8)

The L&N also submitted to this three-judge court at the September 12, 1968 hearing an affidavit stating:

"Trains Nos. 6 and 7 can be put back in operation within a matter of less than twenty-four hours upon the dissolution of the court's order, since none of the equipment that is used in operating these trains will now be disposed of, and it will be kept in operating condition." (Affidavit of Jack Small, 9/10/68, pp. 1-2)

Defendants United States of America and I.C.C. have not interposed any objection to the motion of plaintiffs and intervening plaintiffs for reinstatement of the aforesaid restraining order against the L&N.

The Court finds that in a recent (December 3, 1969) decision of the I.C.C., 336 I.C.C. at 85, the Commission states:

"In *Missouri Pac. R. Co. Control-Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), sustained *sub nom. Illinois Central Railroad Company v. United States*, 263 F. Supp. 421, affirmed per curiam 385 U. S. 457 (1967), C&EI's Chicago-Evansville line was awarded to L&N rather than Illinois Central, *one of the important considerations in the Commission's determination being the anticipated maintenance and improvement of through passenger service between Chicago and the South via the C&EI and L&N route . . .*" (Emphasis supplied.)

The Illinois Central Railroad continues to run trains to and from the South and so should the L&N continue to operate the "Hummingbird" trains pending final determination herein.

The Court finds that the I.C.C. is without jurisdiction to order interim relief beyond a four month period in connection with the "Hummingbird" trains pending the Commission's further proceedings herein. The Court itself does have jurisdiction to reinstate operation of the "Hum-

mingbird" trains pending the Commission's further proceedings herein.

It is, therefore, ORDERED that the restraining order entered herein on September 6, 1968, and continued September 12, 1968, be and the same is hereby reinstated to become effective within ten (10) days of the date of this order.

The three-judge court also is of the opinion that the I.C.C. should also reopen its investigations in the matter of the "Georgian" trains (Chicago-Evansville) involved in case No. 68 C 956, with due and proper notice to all parties in interest, and that the matters involved in cases 68 C 956 and 68 C 1666 should be consolidated by the I.C.C. in further proceedings.

The Court finds that in the proceedings before the I.C.C. relating to the discontinuance of the C&EI's "Georgian" trains the public did not receive adequate notice from the railroads or of the I.C.C. proceedings; and, further, although the residents of the States of Kentucky, Tennessee and Georgia were vitally interested in continued through passenger service by the railroads and the respective governors of those States were entitled to notice of the proceedings before the I.C.C., no notice was given them beforehand.

The Court is of the view that through passenger service from Chicago to and throughout the Southeastern part of the United States might or could be vital to the general public interest and that such service is so interwoven and entwined between the various railroads that only in a consolidated proceeding can a just and fair decision be reached.

It is, therefore, ORDERED that the orders of the I.C.C. in its Finance Docket Nos. 24725 and 25047, in so far as such orders discontinue the respective investigations, be and they hereby are vacated and that both causes numbered 68 C 956 and 68 C 1666 be and they hereby are remanded to

the I.C.C. and consolidated for further proceedings in accordance with the statutes so made and provided.

The Court enters the above orders in conformity with the opinion of the Supreme Court of the United States and for the purpose of carrying out the Supreme Court's mandate.

(s) WIN G. KNOCH
Circuit Judge

(s) J. SAM PERRY
District Judge

(s) EDWIN A. ROBSON
District Judge

Dated: Chicago, Illinois,
March 19, 1970.

APPENDIX C

28 U.S.C. § 2325

§ 2325. Injunction; three-judge court required:

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 970.

49 U.S.C. § 13a(1)

DISCONTINUANCE OR CHANGE OF CERTAIN OPERATIONS OR SERVICES

SEC. 13a(1). A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or

constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants.
No. 68 C 1666

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that LOUISVILLE AND NASHVILLE RAILROAD COMPANY, one of the defendants in the above matter, does hereby appeal to the Supreme Court of the United States from the order entered in this proceeding on March 19, 1970, vacating and setting aside the orders of the Interstate Commerce Commission in Finance Dockets 24725 and 25047, consolidating the two proceedings and remanding them to the Interstate Commerce Commission, which order purports to be entered in conformity with the opinion of the Supreme Court, and for the purpose of carrying out its mandate.

The Clerk will please certify the record in this cause and provide for its transmission to the Clerk of the Supreme Court of the United States.

This appeal is taken pursuant to Title 28 United States Code, Sections 1253 and 2101(b).

Dated: April 17, 1970

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APPENDIX E

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

TENNESSEE PUBLIC SERVICE COMMISSION, et al., *Plaintiffs,* vs. UNITED STATES OF AMERICA, et al., *Defendants.*	No. 68 C 1666

AMENDMENT TO NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that LOUISVILLE AND NASHVILLE RAILROAD COMPANY, one of the defendants in the above matter, does also appeal to the Supreme Court of the United States from the order entered in this proceeding on March 19, 1970, reinstating the restraining order which would purport to re-establish the operation of the "Hummingbird" trains.

Dated: April 17, 1970

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